IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 5, 2006 Session

MICHAEL FRAZIER, ET AL. v. HOWARD POMEROY, ET AL.

Appeal from the Chancery Court for Davidson County
No. 03-1178-III Ellen Hobbs Lyle, Chancellor

No. M2005-00911-COA-R3-CV - Filed on December 7, 2006

The plaintiff husband and wife entered into a series of transactions with the wife's parents that resulted in all the parties living together in property titled jointly to both couples. This dispute arose over the distribution of proceeds from the sale of that property after a falling out between the couples. The trial court, making extensive findings of fact and a thorough accounting, split the proceeds equally, but awarded the plaintiffs their equity in a house previously owned by the defendants, but occupied by the plaintiffs. Because the trial court's findings are supported by the evidence, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Lawrence D. Wilson, Nashville, Tennessee, for the appellants, Howard and Edna Pomeroy.

Todd E. Panther, Nashville, Tennessee, for the appellees, Michael and Deborah Frazier.

OPINION

I. FACTS

This case involves an intrafamily dispute arising from a series of transactions between, on one hand, Dr. Howard Pomeroy and his wife, Edna Pomeroy, and, on the other, the Pomeroys' daughter and her husband, Michael and Deborah Frazier. The dispute is over entitlement to funds deposited with the trial court that resulted from the sale of real property in which both parties claimed an interest.

Before the transactions that form the bases of the claims herein, Dr. and Mrs. Pomeroy owned and lived in a three-level condominium, #55 Rich Meade Condominiums. Dr. Pomeroy broke his

leg and, as a consequence, the Pomeroys decided to move to a single-floor unit. They purchased and moved into unit #89. The Pomeroys' daughter, Deborah Frazier, and her husband Michael then moved into Unit #55, which the Pomeroys still owned. The Fraziers later obtained financing for the remaining debt on Unit #55, which was then titled in their own names. The Fraziers subsequently had a child and felt they needed a larger home. They also discussed with the Pomeroys the possibility of all of them living together, and they agreed to look for a house that might make this possible.

In April of 1989, the Fraziers and the Pomeroys became interested in a house on Buffalo Road which was to be auctioned off. Both couples looked at the property and liked it.[1] The Fraziers attended the auction and called the Pomeroys while it was still going on, and the Pomeroys agreed to purchase the house for $162,000 with seller financed terms. Mr. Frazier signed the auction contract. He provided a personal check for $24,300 to the auctioneer, and the next day Mr. Frazier and Mrs. Pomeroy went to her bank and withdrew $24,300, which was exchanged for the check. Mr. Frazier contributed an additional $16,200, which he obtained from his mother, toward the closing costs for the house. The Buffalo Road property was deeded to Dr. and Mrs. Pomeroy, and they made payments under the original seller-financed sales contract in 1989 of approximately $20,000. In February of 1990, Mr. Frazier arranged for a new mortgage in the amount of $120,000.

From April 1, 1990, until February, 1991, the Pomeroys made the monthly mortgage payments. Mr. Frazier filed a bankruptcy petition in October, 1990. Starting in February, 1991, the Fraziers began making some payments to Dr. Pomeroy which were used to defray the mortgage payments. In September, 1993, the Fraziers began making the monthly mortgage payments directly to the mortgage company. This practice continued until the house was sold in May, 1998.

By 1997, Dr. Pomeroy's health had deteriorated, and it was agreed by all parties that the Fraziers would live with the Pomeroys and assist in his care. In October of 1997, the Pomeroys purchased a residence at Darden Place, using a $100,000 bridge loan, a life insurance policy, and other cash. The Buffalo Road house was sold in May, 1998, with a net of approximately $275,000 remaining after the mortgage and other expenses were paid. The Pomeroys received all the profits from the sale and used some of them to pay off the bridge loan for the Darden Place house.

A few months after they moved in with the Pomeroys, the Fraziers informed the Pomeroys they would not stay unless their names were added to the deed on the Darden Place house. On June 23, 1998, Dr. and Mrs. Pomeroy executed a quitclaim deed conveying the Darden Place property to the Fraziers and the Pomeroys as tenants in common. On the same day, the parties refinanced the Darden Place property, making both the Pomeroys and the Fraziers liable for the debt. The proceeds from the refinancing went to the Pomeroys to repay their investment in the property.

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[1] The proof showed that the Pomeroys never moved into the Buffalo Road house with the Fraziers as originally planned, and the house was sold after Dr. Pomeroy's medical condition made it apparent that he would never be able to live there.

During the next four years, the families lived together at Darden Place. They each deposited funds monthly into a joint household account, with the Fraziers paying slightly more than the Pomeroys, since their son also lived there. The mortgage and other expenses were paid from this account.

In the spring of 2001, the parties established a home equity line of credit in the amount of $200,000. The first draw was for $60,000, which was deposited into the joint household account and paid equally to the couples through $30,000 checks to each.[2] That practice was continued in that equal distributions were always made of any proceeds drawn from the line of credit. Some draws were made to pay for renovations made to the property in 2002.

All was well in the Darden Place home until the summer of 2002. At that time, for various and disputed reasons, Dr. Pomeroy moved out of the house.[3] Mrs. Pomeroy moved out in early 2003. In April of 2003, Mr. Frazier withdrew $22,500 of the remaining available money in the line of credit because he learned that Dr. Pomeroy had inquired about withdrawing the balance. Mr. Frazier later deposited these moneys with the court when this lawsuit was filed.

The Fraziers went on vacation to Europe in April of 2003, and while they were gone, Mrs. Frazier's sister stayed at the Darden Place home with the Fraziers' son. The Pomeroys returned to the Darden Place house on April 23 with the intent of taking up residence there again. The Fraziers filed a complaint requesting a temporary restraining order to prevent the Pomeroys from "residing in or entering upon" the property and the court granted the order. The Pomeroys vacated the premises.

The complaint filed by the Fraziers sought partition of the property and other damages. The Pomeroys counter-claimed. The trial court ordered both sets of parties to deposit all proceeds from the line of credit and joint household account. After the parties were unable to agree on the disposition of the Darden Place property or the personal property therein, and in response to various motions, the trial court ordered the Darden Place Property be sold at auction. Mr. and Mrs. Frazier purchased the house at the auction and deposited the net proceeds from the sale of the house with the court.

After a number of amendments and attempted amendments to the pleadings, the case went to trial. The Pomeroys asserted they had signed the quitclaim deed making the Fraziers tenants in common with them on the Darden Place property on the condition that the Fraziers take care of them, to keep them from having to go into a nursing home. They also asserted that they believed the transfer of interest would only take effect at their death and that at that time the Fraziers would own

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[2] Mrs. Pomeroy had accumulated $30,000 in credit card debt, and Dr. Pomeroy wanted to pay that off, so the Pomeroys' share was used for that purpose.

[3] The Pomeroys were having marital problems at that time, and Mrs. Pomeroy filed a complaint for divorce. Apparently, they later reconciled.

one-half interest in the property and the Pomeroys' other children would inherit the other one-half interest.

The Fraziers denied that any such conditions had been placed on their interest in the Darden Place property. They asserted that their interest arose from the financial contributions they made to the cost of the property, including their share of profits from the sale of the Buffalo Road property. While that property had been titled solely in the names of the Pomeroys, the Fraziers argued they had contributed substantially to it, including making two-thirds of the mortgage payments.

The Pomeroys argued that the Fraziers should be judicially estopped from claiming an interest in the Buffalo Road property, since Mr. Frazier had not included any such interest in his 1990 bankruptcy filings.

II. TRIAL COURT PROCEEDINGS

This case resulted in a four day trial and produced a voluminous record. The trial court meticulously set out the issues and the evidence in a thorough memorandum and order filed January 13, 2005. After various post-judgment motions, a final order was entered March 14, 2005. As the trial court stated, by the time the case went to trial the only remaining issue was how to allocate between the Pomeroys and the Fraziers the money deposited with the clerk, at trial time totaling $154,463.57. This amount was comprised of the proceeds from the sale of the Darden Place property and moneys from the joint account and the line of credit. The question of how to deal with the Fraziers' contributions to the Buffalo Road property was an included issue.

The trial court found that the preponderance of the evidence supported the Fraziers' claims and awarded them 50% of the funds on deposit with the court with prejudgment interest, $57,877.29 for their equity in the Buffalo Road property, and $2,905.78 for Darden Place expenses from April to August of 2003. The trial court made a number of findings of fact.

With regard to the Buffalo Road property, the court found it was titled in the Pomeroys' name because the Fraziers could not afford it at that time, but needed a larger home. It was understood by all the parties that the Fraziers would live in the house and improve it. It was also the parties' intention that the house would be renovated for the Pomeroys to live there too. The court specifically found "after the Fraziers became financially able and sorted out their financial matters through bankruptcy, the evidence is clear that the parties intended for the Fraziers to have an ownership interest in the Buffalo Road property as evidenced by the conduct of the parties."

The court also found that during the time the Fraziers lived in the Buffalo Road house the two couples contributed proportionately to the maintenance and refurbishing of the house. It also found that the Fraziers had contributed two-thirds of the mortgage payments, and the Pomeroys one-third.

Although the parties intended that the Pomeroys move in with the Fraziers at the Buffalo Road house and drew up plans to effectuate that, it became impossible because of Dr. Pomeroy's medical condition, including surgery to his leg.

After the Pomeroys moved into the Darden Place property, the Buffalo Road house was sold, and the Pomeroys collected all the profit. "Thus, by the time the Buffalo Road property sold, the Fraziers' investment in Buffalo Road was part of the monies used by the Pomeroys to purchase Darden Place, keeping in mind that in the fall of 1997, the Pomeroys had put up the cash and credit necessary to purchase Darden Place."

The court found that several months after the Fraziers moved into Darden Place, they told the Pomeroys they would not stay unless the parties obtained a new mortgage and the Fraziers' names were placed on the deed. Further, the trial court found, "the Pomeroys knowingly and willingly agreed to a joint ownership of the Darden Place property." The quitclaim deed accomplished the transfer of property to the Pomeroys and Fraziers jointly, and the property was refinanced, with all parties jointly obligated for the debt. The court specifically found that the refinancing paid back to and paid off the obligation the Pomeroys had assumed in the purchase of Darden Place. "Not equalized or accounted for, however, was the Fraziers' contribution to Buffalo Road traced through and invested in Darden Place."

After detailing the parties' practice of contributions to and withdrawals from the joint household account as well as the draws made from the line of credit, the trial court found that "from the inception of the household account and line of credit Michael Frazier correctly allocated the relative contributions and withdrawals of the parties."

The court addressed the Pomeroys' claim that the Fraziers' interest in the Darden Place property was conditioned upon the Fraziers' agreement they would take care of the Pomeroys and that upon the deaths of the Pomeroys the property would vest jointly in the Fraziers and the Pomeroys' other children. The court found this claim that the ownership interest was conditional was not supported by proof.

> . . . the [Pomeroys'] testimony at trial varies from their answers to interrogatories, divorce papers and varies the terms of the quitclaim deed and loan documents signed by the parties. The [Pomeroys'] testimony, therefore, is not entitled to weight and does not constitute reliable proof on which to find that the [Fraziers'] ownership of Darden Place was conditional.

Additionally, with regard to the Pomeroys' other claim regarding ownership of the Darden Place property, the trial court found:

> One last point on the ownership of Darden Place pertains to the defendants' execution of the quitclaim deed. The proof established that since the time Michael Frazier had married the Pomeroys' daughter that he had prepared the defendants'

> taxes and counseled with the defendants on financial matters. Mr. Frazier is a certified public accountant. The defendants testified that they did not intend to absolutely convey the Darden Place property to the plaintiffs when they signed the quitclaim deed and that they only signed the deed because Michael Frazier told them to do so. While the proof established that the defendants had various physical infirmities, the proof did not demonstrate that the defendants were mentally incapable of understanding their actions in executing the quitclaim deed; nor did the defendants demonstrate any sort of duress or undue advantage or influence by plaintiff Michael Frazier. The defendants failed to demonstrate sufficient grounds for this Court to set aside or disregard the defendants' execution of the quitclaim deed.

Based on the findings of joint ownership and appropriate allocation of household expenses, the court determined the funds on deposit should be allocated equally. Then, the court addressed the Fraziers' claim based on their equitable interest in the Buffalo Road house.[4] Based on its findings that the Fraziers had contributed two-thirds of the mortgage payments and the Pomeroys had received all the net proceeds from the sale of that property, thereby receiving repayment for their initial outlays to purchase Darden Place, the court determined that the disparity of Buffalo Road mortgage payments made by the Fraziers had never been accounted for or rectified. Through detailed accounting and calculation, the court determined the Fraziers were entitled to $57,877.29, based on the imposition of a trust on the Buffalo Road property. In support of this conclusion, the trial court found:

> The facts in the case at bar which support the imposition of a constructive trust are that Mr. and Mrs. Frazier, with the Pomeroys' knowledge, participation and consent, acted and performed tasks consistent with creating an ownership interest: the Fraziers found the property; attended the auction; signed the auction contract; determined how the property should be titled; made improvements to the Buffalo Road property alongside the Pomeroys; found an architect to develop plans for remodeling the Buffalo Road property; made arrangements to refinance the Buffalo Road property; consistently lived in the Buffalo Road property for eight years; paid the mortgage payments 100% for five years; and in total paid two-thirds of the mortgage payments.

Finally, the trial court addressed the Pomeroys' contention that the Fraziers were judicially estopped from claiming an equitable interest in the Buffalo Road house because Mr. Frazier had failed to disclose any such interest in his Chapter 7 Bankruptcy proceedings filed in October of 1990. The trial court concluded judicial estoppel did not apply because Mr. Frazier did not make willfully false statements in court papers. The court found that at the time Mr. Frazier filed his bankruptcy he and Mrs. Frazier had not yet begun paying the mortgage on the Buffalo Road property. It was not

[4] Although the trial court set out its holdings in two steps, we think that crediting the Fraziers for their financial contribution to the Buffalo Road house was part of the determination of how to divide up the proceeds from Darden Place. Several other references by the trial court indicate it viewed the analysis the same way.

until 1993 that the Fraziers began paying 100% of the mortgage payments, and they continued to do so for the next five years. Consequently, the court held:

> The ambiguous status of Michael Frazier's interest in Buffalo Road, both because his wife had a distinct interest and a strong case of an equitable interest on Buffalo Road had not accumulated at the time he filed his bankruptcy petition, causes the Court to credit Mr. Frazier's testimony that he had no intention to misstate his assets and that he signed his bankruptcy petition believing that it was entirely proper. This proof refutes the defendants' assertion that the omission of the property from the bankruptcy petition was a wilful falsehood. The Court concludes that Mr. and Mrs. Frazier are not judicially estopped from asserting that Dr. and Mrs. Pomeroy held the Buffalo Road property in trust for their benefit and the benefit of Mr. and Mrs. Frazier as tenants-in-common. The investment in Darden Place of the Fraziers' equity in Buffalo Road requires the Pomeroys to pay $57,877.29 to the Fraziers.

III. STANDARD OF REVIEW

In this appeal the Pomeroys assert the trial court erred in several respects. While some of their arguments address specific items in the financial accounting, the remainder challenge more fundamental findings: the Fraziers' claims to an interest in both the Darden Place property and the Buffalo Road property. In reviewing the trial court's ruling, this court reviews findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Blair v. Brownson*, 197 S.W.3d 681, 684 (Tenn. 2006). Questions of law are reviewed *de novo* with no presumption of correctness. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006).

In addition, where factual findings are based on credibility determinations, we give greater deference to the trial court's decision on credibility. *Jones v. Garrett*, 92 S.W.3d 835, 839 (Tenn. 2002). Because trial courts are in a far better position than this court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses' testimony lies in the first instance with the trial court. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997). Consequently, where issues of credibility and weight of testimony are involved, appellate courts will accord considerable deference to the trial court's factual findings. *Hurst v. Labor Ready*, 197 S.W.3d 756, 760 (Tenn. 2006); *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998). Stated another way, "The credibility accorded by the trier of fact will be given great weight by the appellate court." *Weaver v. Nelms*, 750 S.W.2d 158,160 (Tenn. Ct. App. 1987); *see also In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *Whitaker*, 957 S.W.2d at 837; *Doe v. Coffee County Bd. of Educ.*, 925 S.W.2d 534, 537 (Tenn. Ct. App. 1996).

In the case before us, the trial court made definite credibility findings. In regard to the Pomeroys' proof about their contribution to Darden Place, the court stated:

> The proof offered by the Pomeroys on the payments they claimed was chiefly provided by Mrs. Pomeroy whose testimony, with one exception, was speculative and uncertain: Mrs. Pomeroy had some difficulty recalling facts; she admitted her memory was faulty; she testified that her son, Randy Pomeroy, would provide back-up invoices and documents but none was provided: her testimony was not supported by any meaningful accounting.

Additionally, the trial court found that the testimony of the Pomeroys about the conditional nature of the quitclaim deed was "uncertain and contradictory." Finally, in the order denying the motion to alter or amend, the court found:

> In most general terms, the defendants lost because the Court did not believe them and, in a case requiring accounting, the defendants did not have records to back up their testimony. The reason the Court did not believe the defendants is because their testimony was confused and contradictory. These findings are stated on pages 14, 15, 24, and 25 of the Court's memorandum and order.

IV. THE FRAZIERS' INTEREST IN THE DARDEN PLACE PROPERTY

The Darden Place property was owned jointly by the Fraziers and the Pomeroys by virtue of the quitclaim deed executed by the Pomeroys at the request of the Fraziers shortly after the Fraziers moved in. At the same time, the property was refinanced, and both couples were obligated on the debt. For the next five years, until the falling out that occurred in 2003, the parties split the mortgage payments as well as household expenses and made equal draws from the equity line of credit.

On appeal, the Pomeroys challenge the finding that the Fraziers owned one-half of the Darden Place property. By counterclaim, the Pomeroys asserted that their transfer of interest in the property to the Fraziers had been conditional and that the conditions had not been met. Alternatively, they assert that their execution of the quitclaim deed was the result of undue influence by Mr. Frazier.

A. Conditional Transfer

The Pomeroys assert that the transfer of the interest in the Darden Place property was conditioned upon the Fraziers continuing to live with and care for the Pomeroys. Obviously, when the Pomeroys moved out and the Fraziers later had them removed by court order, that alleged condition was no longer being met.

The trial court found the transfer was not conditional, largely because there was insufficient credible proof to overcome the absolute grant in the deed. We agree with the trial court's conclusion on that issue. The conclusion is buttressed by the fact that there was separate consideration for the transfer of the ownership interest: the Fraziers undertook half of the financial responsibility for the

property. We affirm the trial court's holding that the Pomeroys' transfer of interest in Darden Place was not conditional.

B. Undue Influence

To be valid, a deed must be the result of the conscious, voluntary act of the grantor. *Conservatorship of Groves*, 109 S.W.3d 317, 351 (Tenn. Ct. App. 2003); *Fell v. Rambo*, 36 S.W.3d at 846. A transaction involving the transfer of property may be set aside if it is shown that it was the product of undue influence. *Brown v. Weik*, 725 S.W.2d 938, 945 (Tenn. Ct. App. 1983). Undue influence consists of substituting the will of one person for that of another. 1 JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON THE LAW OF WILLS AND THE ADMINISTRATION OF ESTATES § 124, at 203 (5th ed. 1994) (discussing undue influence on a testator in the disposition by will).

The essential issue on a question of undue influence is whether the transfer of property was contrary to the free and independent will of the grantor. As a general rule, it is presumed that undue influence does not enter into the making of a conveyance, and the burden of proving undue influence falls upon the person contesting the document. *Hammond v. Union Planters Nat'l Bank*, 189 Tenn. 93, 109, 222 S.W.2d 217, 383-84 (1949). That party has the burden of proving that the grantor was unduly influenced in making the transfer. *In re Estate of Elam*, 738 S.W.2d at 173; *Owen v. Stanley*, 739 S.W.2d 782, 787 (Tenn. Ct. App. 1987). Thus, in the case before us, the burden to show undue influence was on the Pomeroys.

Parties seeking to set aside a transfer may carry their burden of proving that the grantor was unduly influenced by proving the existence of suspicious circumstances warranting a conclusion that the transfer was not the grantor's free and independent act. *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989); *Taliaferro v. Green*, 622 S.W.2d 829, 835-36 (Tenn. Ct. App. 1981). Among those circumstances are the existence of a confidential relationship between the grantor and the grantee in which one person is in a position to exercise dominion and control over the other.[5] *Childress v. Currie*, 74 S.W.3d 324,328 (Tenn. 2002); *Conservatorship of Groves*, 109 S.W.3d at 351; *Robinson v. Robinson*, 517 S.W.2d 202, 206 (Tenn. Ct. App.1974).

> The existence of a confidential relationship between the grantor and the grantee, by itself, does not warrant rescinding a deed. Thus, persons seeking to rescind a deed must prove the existence of other suspicious circumstances that would reasonably support a conclusion that the grantor did not act freely and independently. These suspicious circumstances include, but are not limited to, the grantor's physical and

[5] While some relationships are *per se* confidential by law, relationships arising from "family or other relationships," without more, are not sufficient to prove confidential relationship. *Harper v. Watkins*, 670 S.W.2d 611, 628 (Tenn. Ct. App. 1983). A parent-child relationship, for example, raises no presumption of invalidity of a gift or transfer of property from one to the other. *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977). Where close family relationships are involved, proof of the additional elements of dominion and control is necessary to give rise to the presumption of undue influence. *Matlock v. Simpson*, 902 S.W.2d 384, 385-86 (Tenn. 1995) (citing *Kelly*, 558 S.W.2d at 845); *see also Mitchell*, 779 S.W.2d at 384.

> mental deterioration and the grantee's active involvement in procuring the conveyance. The existence of a confidential relationship combined with a transaction benefitting the dominant party gives rise to a presumption that undue influence was exercised. This presumption effectively shifts the burden to the grantee to present clear and convincing evidence that the challenged conveyance was fair.

Conservatorship of Groves, 109 S.W.3d at 351-52. Thus, parties attacking a conveyance on the grounds of undue influence must prove the existence of suspicious circumstances **warranting the conclusion that the person allegedly influenced did not act freely and independently.** *Fell v. Rambo*, 36 S.W.3d at 847.

The Pomeroys argue that Mr. Frazier was in a confidential relationship with them and that Dr. Pomeroy's poor health made them susceptible to influence. We need not determine whether a confidential relationship of the required type existed because other requirements of undue influence are simply not present. The only conduct alleged to have unduly influenced the Pomeroys into transferring part ownership to the Fraziers was the statement by the Fraziers that they would not remain in the Darden Place home unless they were part owners. In their brief, the Pomeroys quote part of Michael Frazier's testimony as exemplifying the influence:

> Well, Debbie and I had a conversation with Dr. and Mrs. Pomeroy and told them that the Buffalo Road property had been sold. It was time to refinance the Darden property, putting our name on there from our equity contribution from the Buffalo Road property and they first had some resistance and then they agreed to do it. We told them we were not going to live there any longer and contribute to the payments on the house if we weren't part owners showing on the title on this house and that's when they agreed to do that.

This testimony does not reflect undue influence. It was part of an arrangement that the Pomeroys could accept or reject. Nothing about it indicates that the Fraziers overcame the Pomeroys' will or exerted any influence that dominated their independent action.

One of the basic requirements of a claim of undue influence is that the transaction at issue favor the party allegedly influencing the grantor. Usually, such a claim arises in the context of an inter vivos gift or a devise by will. Where, as in the case before us, the challenged transfer was actually part of a mutual transaction with all parties providing consideration and receiving benefit, it is questionable whether the basic requirement that the transaction favored the Fraziers has been shown. Nonetheless, because it is possible that a business transaction might be so one-sided as to be the product of undue influence, we will examine the question of benefit in the context of the fairness question that is part of the traditional undue influence analysis.

Even if the evidence were sufficient to create the presumption that the transfer was the product of undue influence, that presumption can be overcome by clear and convincing evidence that the challenged transaction was fair. *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 793 (Tenn. Ct.

App. 2001); *see also Matlock*, 902 S.W.2d at 386; *Richmond v. Christian*, 555 S.W.2d 105, 107 (Tenn. 1977). The "fairness of the transaction" measures the objective fairness to the party alleged to be the weaker or the party making the transfer. *See, e.g., Richmond*, 555 S.W.2d at 105 (holding unfair a transaction where an elderly woman transferred her only asset to her son and, thereby, impoverished herself). Because the effect of undue influence creates a disposition contrary to the independent will of the grantor, *Crain v. Brown*, 823 S.W.2d 187, 194 (Tenn. Ct. App. 1991), courts will look at whether the transfer was unjust or unnatural. *Mitchell*, 779 S.W.2d at 388.

Nothing in the arrangement under which the Pomeroys and the Fraziers lived in the Darden Place property together was unfair to the Pomeroys. The two couples contributed equally to the cost of the property. This type of arrangement, equal ownership for equal financial contribution, is certainly not unusual, and such transactions do not raise an issue of undue influence. The Fraziers wanted their joint contribution and ownership to be reflected on the deed. That documentation simply reflected the actual situation.

We affirm the trial court's holding that the quitclaim deed was not the product of undue influence.

V. EQUITY IN BUFFALO ROAD PROPERTY

The trial court ordered the Pomeroys to pay the Fraziers for the Fraziers' equity in the Buffalo Road house which had not been accounted for in the equal distribution of the Darden Place property. The Pomeroys assert that the Fraziers are judicially estopped from claiming an interest in the Buffalo Road house; that the trial court erred in imposing a constructive or resulting trust on the property for the benefit of the Pomeroys; and that the court incorrectly determined that the contributions by the parties to the maintenance and renovation of the Buffalo Road property was proportionate.

A. Judicial Estoppel

The Pomeroys' judicial estoppel claim arises from Mr. Frazier failing to mention an interest in the Buffalo Road property in his bankruptcy filings. The trial court ruled that the Fraziers were not judicially estopped from claiming such an interest because Mr. Frazier did not make any knowingly false statements in his bankruptcy petition and because the Fraziers did not begin to obtain an equitable interest until they began making mortgage payments, well after the bankruptcy. On appeal, the Fraziers further argue that Mrs. Frazier cannot be estopped from claiming her interest in the property.

This court has recently set out the requirements for the application of the judicial estoppel doctrine:

> Judicial estoppel is an equitable doctrine designed to prevent parties from "gaining an unfair advantage" in judicial proceedings by making inconsistent statements on the same issue in different lawsuits. *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn.

1999) (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 30 (Tenn. 1995)). As the Tennessee Supreme Court has warned, "[o]ne cannot play fast and loose" with the courts. *Fidelity-Phenix Fire Ins. Co. of N.Y. v. Jackson*, 181 Tenn. 453, 464, 181 S.W.2d 625, 630 (1944); *accord Webber v. Webber*, 109 S.W.3d 357, 359 (Tenn. Ct. App. 2003); *Woods v. Woods*, 638 S.W.2d 403, 406 (Tenn. Ct. App.1982). A trial court's application of the doctrine of judicial estoppel presents a question of law which this court reviews de novo. *Carvell v. Bottoms*, 900 S.W.2d at 30; *Terrell v. Terrell*, 200 Tenn. 289, 295-96, 292 S.W.2d 179, 182 (1956); *Bubis v. Blackman*, 58 Tenn. App. 619, 632-33, 435 S.W.2d 492, 498 (1968).

The doctrine of judicial estoppel does not apply to "anything short of a **willfully false** statement of fact." *D.M. Rose & Co. v. Snyder*, 185 Tenn. 499, 520, 206 S.W.2d 897, 906 (1947); *accord Werne v. Sanderson*, 954 S.W.2d 742, 745 (Tenn. Ct. App. 1997). Statements made in prior proceedings will not prevent a litigant from establishing the truth in a later proceeding where the litigant can show that the prior statements were made "inconsiderately, by mistake, or without full knowledge of the facts." *Tate v. Tate*, 126 Tenn. 169, 212, 148 S.W. 1042, 1054 (1912); *accord Sturkie v. Bottoms*, 203 Tenn. 237, 242, 310 S.W.2d 451, 453 (1958); *see also* 1 *Pritchard* § 363, at 555-56 (stating that an executor who offered a will for probate would not be estopped from contesting it later where the executor offered the will for probate in good faith and without knowledge of the defects in its execution). Moreover, litigants are entitled to have an opportunity to explain that a prior statement was inadvertent, made inconsiderately, or based on a mistake of fact or law before the doctrine of judicial estoppel can be applied. *State ex rel. Scott v. Brown*, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996); *State ex rel. Ammons v. City of Knoxville*, 33 Tenn. App. 622, 630-31, 232 S.W.2d 564, 567-68 (1950).

Estate of Boote, 198 S.W.3d 699, 719-20 (Tenn. Ct. App. 2005) (emphasis added).

The trial court herein found that Mr. Frazier's failure to include an equitable interest in his list of assets in the bankruptcy filing was not willfully false. There are bases upon which to conclude it was not false at all. Additionally, the uncertainties of the situation support a conclusion that, even if in retrospect Mr. Frazier should have claimed an interest at that time, his failure to do so was by "mistake or without full knowledge of the law."

Accordingly, we affirm the trial court's determination that the Fraziers were not judicially estopped from claiming an interest in the proceeds from the Buffalo Road property sale.

B. Trust On Proceeds From Sale

In its final order, the trial court explained the claim underlying this issue:

> This claim is based upon the [Fraziers'] theory that in equity they had an interest in the Buffalo Road property and that their contribution to the Buffalo Road property should be accounted for and accredited to them in the purchase of the Darden Place property and in the resulting profitable sale of the Darden Place property.

The court found that the disparity of Buffalo Road mortgage payments by the Fraziers (2/3 to 1/3 by the Pomeroys) had "never been accounted for or rectified" since all the net profit from the sale of the Buffalo Road house had been used to acquire the Darden Place property and the parties had thereafter split the expenses equally.

After doing a painstaking accounting of the transactions and sources of money, the court found that the Pomeroys owed the Fraziers $57,877.29. The court then stated, "The legal basis for recovery by the plaintiffs of $57,877.29 is the imposition of a trust on the Buffalo Road property for the benefit of the parties as tenants in common, based upon the cases cited in the plaintiffs' trial brief, particularly *Armstrong v. Larkin*, 1988 WL 27226 (Tenn. Ct. App. March 23, 1988)." The court then recounted the facts it found supported the imposition of a "constructive" trust.

On appeal, the Pomeroys first argue that the facts found by the court do not support imposition of a constructive trust and that the cases relied on by the trial court also do not apply to constructive trusts. The Fraziers do not directly dispute this argument, but argue that the facts support the finding of an oral trust or the imposition of a trust in the land, without specifying the type of trust.

We conclude that the trial court simply misspoke in using the term "constructive" trust because the reasoning of the court and the factual finding clearly indicate the court intended to refer to "resulting" trust. Both types of trusts are created by courts as a matter of equity in order to satisfy the demands of justice. *Burleson v. McCrary*, 753 S.W.2d 349, 352 (Tenn. 1988). While resulting trusts are generally imposed in accordance with the parties' intention, constructive trusts are generally imposed without reference to any presumed intent of the parties. *Id.*, 753 S.W.2d at 352-53.[6] Since the trial court relied on facts it found showed the parties' intent, the court clearly meant to say "resulting" rather than "constructive" trust.

Essentially, the Fraziers claim an interest in the Buffalo Road property that was inconsistent with the deed, which showed the Pomeroys as the sole owners. Consequently, the following standard applies:

> When the parol evidence of a resulting trust is in conflict with the terms of a written instrument, it is not essential that the evidence remove all reasonable doubt, but it must be so clear, cogent, and convincing that it overcomes the evidence to the

[6] A constructive trust also requires a showing that a person has acquired property through inequitable means and, in equity, should not hold or enjoy it. *Roach v. Renfro*, 989 S.W.2d 335, 341 (Tenn. Ct. App. 1998). The Fraziers do not even make allegations that meet this criteria.

> contrary and the presumption that exists in favor of the terms of the written instrument.

Saddler v. Saddler, 59 S.W.2d 96, 99 (Tenn. Ct. App. 2000); *see also St. Clair v. Evans*, 857 S.W.2d 49, 51 (Tenn. Ct. App. 1993).

Thus, a party seeking to establish a resulting trust by parol proof, which is frequently the case, must meet a higher standard of proof than a mere preponderance of the evidence. *Roach v. Renfro*, 989 S.W.2d 335, 340 (Tenn. Ct. App. 1998). In order to sustain a resulting trust in the face of a written instrument, "the evidence must be so clear, cogent and convincing so as to overcome the opposing evidence, coupled with the presumption that obtains in favor of the written instrument." *Latshaw v. Latshaw*, 787 S.W.2d 9, 11 (Tenn. Ct. App. 1989).

This court has described resulting trusts as "judge-created trusts or doctrines which enable a court, without violating all rules of logic, to reach an interest in property belonging to one person yet titled in and held by another." *Wells v. Wells*, 556 S.W.2d 769, 771 (Tenn. Ct. App. 1977). Thus, a resulting trust is an equitable creation which enables a court to reach an interest in property which rightfully belongs to a person who does not hold title. *Smalling v. Terrell*, 943 S.W.2d 397, 400 (Tenn. Ct. App. 1996); *Estate of Wardell v. Dailey*, 674 S.W.2d 293, 295 (Tenn. Ct. App.1983).

Resulting trusts prevent unjust enrichment and protect an individual's equitable right to property when the legal title to that property is in the name of another. *In re Estate of Nichols*, 856 S.W.2d 397, 401 (Tenn. 1993). A resulting trust arises where property is acquired under circumstances where equity infers that the beneficial interest in the property is not to accompany the legal title. *Roark v. Bischoff*, 829 S.W.2d 688 (Tenn. Ct. App. 1991).

> Such a trust is implied by law from the acts and conduct of the parties and the facts and circumstances which at the time exist and surround the transaction out of which it arises. Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and there ordinarily being no fraud or constructive fraud involved.

In re Estate of Nichols, 856 S.W.2d at 401 (quoting 76 AM.JUR.2d *Trusts* § 166, pp. 197-98 (1992)).

Depending on the circumstances presented, a court will decree a resulting trust to prevent a failure of justice. *Id*. There are a number of situations that can given rise to a resulting trust, the essential ingredient being avoidance of injustice:

> While resulting trusts generally arise (1) on a failure of an express trust or the purpose of such a trust, or (2) on a conveyance to one person on a consideration from another--sometimes referred to as a "purchase-money resulting trust"--they may also be imposed in other circumstances, such that a court of equity, shaping its judgment in the most efficient form, will decree a resulting trust--on an inquiry into the consideration of a transaction--in order to prevent a failure of justice.[7]

In re Estate of Nichols, 856 S.W.2d at 401 (quoting 76 Am.Jur.2d *Trusts* § 166, 197-98 (1992)).

Generally, a resulting trust upon land must arise at the time of purchase rather than out of any subsequent contract, transaction or conduct. *Smalling v. Terrell*, 943 S.W.2d 397, 400 (Tenn. Ct. App. 1996); *Livesay v. Keaton*, 611 S.W.3d 581, 584 (Tenn. Ct. App. 1980). The proof in the present case shows that while the Pomeroys made the greater contribution to the initial acquisition of the Buffalo Road home, the Fraziers contributed $16,200 towards the closing costs. Mr. Frazier also facilitated the purchase of the home by signing the auction contract as buyer and writing a $24,300 personal check to the auctioneer. Such actions are consistent with an ownership interest in property. They also indicate conduct in furtherance of the intent of all the parties, at the time the property was acquired, that the two couples would eventually share the house.

The subsequent contributions by Mr. and Mrs. Frazier bolstered the implication of an ownership interest, and established a basis for calculating its extent. The trial court found that the Fraziers furnished two-thirds of all the subsequent mortgage payments, amounting to about $119,000, while the Pomeroys' contribution was only $60,666. The Fraziers paid 100% of the mortgage installments directly to the mortgage company after September of 1993, without any contribution by the Pomeroys. We note that while Edna Pomeroy testified that she and her husband purchased the Buffalo Road house for themselves as investment property, she also testified that she never considered the payments on the property made by the Fraziers to constitute rent. We believe that the part the Fraziers played in helping the Pomeroys acquire the property and paying the mortgage installments constitutes clear, convincing and cogent evidence to support the trial court's finding of a resulting trust on a portion of the proceeds from the sale of the Buffalo Road property.

VI. REMAINING ISSUES

The Pomeroys' remaining issues on appeal challenge several of the trial court's specific factual findings. First, they assert that the trial court erred in finding that the Fraziers spent as much as the Pomeroys on the maintenance and repairs of the Buffalo Road property and in finding that the parties were given $10,000 by Ms. Merriman (a family friend) to pay for renovations to that property.

With regard to the second proposition, the Pomeroys' argument is that Mr. Frazier's testimony that the money was a gift to improve the property was contradicted by Dr. Pomeroy's testimony that the money was given solely to him, supported by the fact that the check was written

[7] The trust the trial court found to exist in the present case was not a "purchase-money resulting trust."

to him and he deposited the money into his account. The Pomeroys assert that Mr. Frazier's testimony should not be credited and greater weight given to Dr. Pomeroy's. This is a sufficiency of the evidence question involving issues of credibility. We find no basis to reverse the court on this finding.

With regard to the renovations and improvements to the Buffalo Road property, there was a great deal of detailed testimony from the Fraziers, with invoices, receipts and other documentation for the amounts they claimed. The Pomeroys' testimony, however, was confusing and not supported by receipts or invoices. Although the Pomeroys' son did some of the work and testified herein, he did not introduce any of the records Mrs. Pomeroy had said he had. Again, this is a question for the fact-finder, who is accorded great deference where credibility is involved, and, based on the record before us, we cannot find that the evidence preponderates against the trial court's findings.

In the same vein, but relevant to the other property, Darden Place, the Pomeroys assert that the trial court's finding that in 2002 "all the parties agreed to repairs and renovations to be made on the Darden Place property . . ." was in error. Essentially, that is an argument that the evidence preponderates against the trial court's finding. This claim goes to the distribution of proceeds from the sale of that property.

The Pomeroys do not dispute they were in agreement with the first round of renovations, but assert they did not agree to the second, much more expensive round. The Fraziers testified that the Pomeroys were in fact in agreement, participated in the decisions, and that the renovations were to be financed from the line of credit. The contractor for the renovations testified that almost daily the Pomeroys would say something to the effect that they did not know where the money was coming from for all the renovations. We do not find this testimony directly contradicts the testimony that the Pomeroys agreed to the renovations.

The Pomeroys also point to part of Mr. Frazier's testimony wherein he recounted that Mrs. Pomeroy, when she was upset about Dr. Pomeroy leaving and obviously concerned about the financial and other effects of that, expressed some concern about how all the work was going to be paid for. He testified that they had just gotten a bid of $15,000 for the addition to the Florida room and that he told Mrs. Pomeroy that if it was a problem, "we will pay for that part of the payment toward the line of credit for the adding of the Florida room."

The Pomeroys state that the Florida room eventually cost $38,732.72 and that the Fraziers should bear the cost of this project, since Mr. Frazier agreed to that. We do not interpret the testimony relied on by the Pomeroys as an unconditional promise that the Fraziers would assume all the cost of the Florida room addition. The financial condition Mrs. Pomeroy faced as a result of a divorce and was apparently concerned about did not last since the Pomeroys reconciled and resumed living together. Additionally, Mrs. Pomeroy's statements to Mr. Frazier indicate she knew the Pomeroys would otherwise be liable for part of the cost of that renovation.

Like the other claims discussed in this part, resolution of this issue hinges on whether the evidence in the record preponderates against the trial court's findings of fact, taking into consideration the deference due to findings based on credibility. We again find no basis in our review of the record to reverse the trial court's findings.

CONCLUSION

We affirm the trial court in all respects. The costs on appeal are taxed to the appellants, Howard and Edna Pomeroy.

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PATRICIA J. COTTRELL, JUDGE